

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
WARREN C. HAVENS)	File Nos. 853010-853014
)	
for Automated Maritime Telecommunications)	
System Stations at Chaffee, Aspen, Colorado)	
Springs, Copper Mountain, and Leadville,)	
Colorado)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2002

Released: September 18, 2002

By the Commission:

I. INTRODUCTION

1. On November 30, 2001, Warren C. Havens (Havens) filed an application for review of an *Order on Further Reconsideration* of the Wireless Telecommunications Bureau (Bureau).¹ The *Order on Further Reconsideration* denied Havens's petition for reconsideration of the Public Safety and Private Wireless Division (Division) *Order on Reconsideration* and affirmed the dismissal of his applications for authority to construct and operate Automated Maritime Telecommunications System (AMTS) stations along a segment of the Arkansas River, known as the Arkansas Headwaters.² For the reasons discussed below, Havens's application for review is denied.

II. BACKGROUND

2. AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other maritime vessels.³ Under Section 80.475(a) of the Commission's Rules, AMTS applicants who propose to serve a navigable inland waterway that is less than 150 miles in length must serve that waterway in its entirety.⁴ On the other hand, AMTS applicants who propose to serve a navigable inland waterway that is more than 150 miles in length must provide continuity

¹ Applications of Warren C. Havens, *Order on Further Reconsideration*, 16 FCC Rcd 19240 (WTB 2001) (*Order on Further Reconsideration*).

² *Id.*; Applications of Warren C. Havens, *Order on Reconsideration*, 16 FCC Rcd 9337 (WTB PSPWD 2001) (*Order on Reconsideration*), *aff'g* Applications of Warren C. Havens, *Order*, 15 FCC Rcd 22296 (WTB PSPWD 2000) (*Order*).

³ See Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), *First Report and Order*, GEN Docket No. 88-732, 6 FCC Rcd 437, 437 ¶ 3 (1991).

⁴ 47 C.F.R. § 80.475(a) (2001).

of service for at least 60 percent of the waterway.⁵ AMTS applicants who propose to serve a portion of coastline must provide continuity of service to a “substantial navigational area.”⁶

3. On February 1 and 10, 2000, Havens filed the captioned applications for five AMTS stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, and Leadville, Colorado.⁷ The applications were placed on public notice on February 24, 2000.⁸ Havens proposed to provide AMTS service to a portion of the Arkansas River known as the Arkansas Headwaters, which begins in the Rocky Mountains, near Leadville, and runs 152 miles until it reaches the Pueblo Reservoir.⁹ Havens proposed to cover 146 miles of the Arkansas Headwaters,¹⁰ or about 10 percent of the approximately 1,450-mile Arkansas River.¹¹ Havens noted that the proposed 146-mile coverage represents 96.1 percent of the Arkansas Headwaters,¹² which he argued should be considered a distinct body of water because there is a “break in navigability” after the Pueblo Reservoir.¹³ Havens did not request a waiver of the AMTS coverage requirement.

4. The Division dismissed the applications in an *Order* released on November 15, 2000. The Division stated that the Commission’s Part 80 rules are devoid of any provision allowing applicants to “subdivide” a waterway when that waterway is commonly mapped as a single geographic unit.¹⁴ The Division also noted that when the Commission allocated spectrum for AMTS use on the Mississippi River in 1981, the rules specifically listed the Arkansas River as one of the “navigable waterways” comprising the Mississippi River system.¹⁵ As a result, the Division found that as the term “navigable inland waterway” is used in the Commission’s Part 80 rules, the Arkansas Headwaters is part of the 1,450-mile Arkansas River and is not a distinct waterway.¹⁶ Because Havens did not propose 60 percent coverage of the entire Arkansas River, his applications were dismissed as defective.¹⁷

⁵ *Id.*

⁶ *Id.*

⁷ Applications for Authority to Construct and Operate AMTS Stations, File Nos. 853010, 853011, 853012, 853014 (filed Feb. 1, 2000); Application for Authority to Construct and Operate AMTS Station, File No. 853013 (filed Feb. 10, 2000).

⁸ See Wireless Telecommunications Bureau Weekly Receipts and Disposals, Report No. 2081 (rel. Feb. 24, 2000).

⁹ Supplemental Statement in Support of Applications Filed by Warren C. Havens to Serve the Arkansas Headwaters River (Arkansas Headwaters Recreation Area) with a Series of AMTS Radio Stations at 4 (filed Jan. 24, 2000) (Supplemental Statement).

¹⁰ Supplemental Statement at 4.

¹¹ See *Concise Columbia Electronic Encyclopedia*, Third Edition, Columbia University Press (1994).

¹² Supplemental Statement at 4.

¹³ *Id.* at 1 n.11; Electronic Mail Message from Warren C. Havens to Kimberly Kleppinger and Scot Stone, Federal Communications Commission (dated Aug. 29, 2000).

¹⁴ *Order*, 15 FCC Rcd at 22297 ¶ 4.

¹⁵ *Id.* (citing Amendment of Parts 2, 81 and 83 of the Commission’s Rules to Allocate Spectrum for an Automated Inland Waterways Communications System (IWCS) Along the Mississippi River and Connecting Waterways, *Report and Order*, GEN Docket No. 80-1, 84 FCC 2d 875, 876 ¶ 2, *on reconsideration*, *Memorandum Opinion and Order*, GEN Docket No. 80-1, 88 FCC 2d 678 (1981), *aff’d sub nom. WJG Tel. Co. v. FCC*, 675 F.2d 386 (D.C. Cir. 1982)); 47 C.F.R. § 81.913(a) (1982)).

¹⁶ *Order*, 15 FCC Rcd at 22297 ¶ 4.

¹⁷ *Id.* at 22298 ¶ 5.

5. On December 15, 2000, Havens filed a petition for reconsideration of the *Order*. On May 1, 2001, the Division denied the petition.¹⁸ It rejected Havens's contention that, for purposes of the AMTS coverage requirement, the Arkansas River should be deemed to be comprised of two corridors: the Arkansas Headwaters, and the segment that flows down river from Tulsa, Oklahoma, to the Mississippi River.¹⁹ The Division also stated that Havens had not provided sufficient information in the applications or petition for reconsideration to substantiate his new claim in the petition that the coverage requirement would have been met had Havens simply characterized his applications as providing AMTS service to the various tributaries of the Arkansas Headwaters, rather than the Arkansas Headwaters itself.²⁰

6. On May 31, 2001, Havens requested further reconsideration. On October 31, 2001, the Bureau denied the petition.²¹ The Bureau rejected Havens's argument that the Arkansas Headwaters portion of the Arkansas River should be treated as a distinct navigable inland waterway for purposes of the AMTS service coverage requirement (Section 80.475(a)).²² It also found that Havens did not provide information sufficient to support his claim that the applications comply with the service coverage requirement, if treated as proposing service to major tributaries of the Arkansas Headwaters.²³ Finally, the Bureau did not accept Havens's argument that the captioned applications should be granted even if they do not meet the coverage requirement because, according to Havens, the Bureau has granted similar applications. In this connection, Havens noted the Bureau's prior grant of certain AMTS station applications of Regionet Wireless License, LLC (Regionet), which Havens alleged did not comply with the service coverage requirement.²⁴ The Bureau stated that even if it were to learn of licensing actions which were inconsistent with the Commission's Rules or stated policies, the appropriate course of action would be to consider whether it should take some action with respect to the affected license or licensee rather than to continue misapplication of such Commission Rules and/or policy.²⁵ On November 30, 2001, Havens filed the instant application for review.²⁶ On December 17, 2001, Regionet filed an opposition. On December 28, 2001, Havens filed a reply.

III. DISCUSSION

7. Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.²⁷ The Commission may grant the

¹⁸ *Order on Reconsideration*, 16 FCC Rcd at 9337 ¶ 1.

¹⁹ *Id.* at 9339 ¶ 5.

²⁰ *Id.* at 9340 ¶ 8.

²¹ *Order on Further Reconsideration*, 16 FCC Rcd at 19240.

²² *Id.* at 19242 ¶ 6.

²³ *Id.* at 19242-43 ¶ 7.

²⁴ *Id.* at 19243 ¶ 8.

²⁵ *Id.*

²⁶ Regionet argues that Havens's application for review did not comply with Section 1.49(c) of the Commission's Rules and therefore, should be dismissed. Opposition at 1-2. Specifically, Regionet refers to the summary section of the application for review where Havens states that a full summary of the item is provided by the section headings listed in the table of contents. Application for Review at 2. As Regionet indicates, *see* Opposition at 1-4, such a summary does not comply with 47 C.F.R. § 1.49(c) (the summary of a pleading should not be a mere repetition of the pleading's headings). Havens then states that the introduction section, which exceeds two pages, provides a further summary of the application for review. Application for Review at 2-4. Treating the introduction section as the summary section of the 17-page application for review would render it noncompliant with 47 C.F.R. § 1.49(c) (the summary section of a pleading that is between ten and twenty-five pages should not exceed two pages). Although we do not believe that such defects warrant dismissal of Havens's application for review, we nevertheless admonish Havens to ensure that future pleadings comply with 47 C.F.R. § 1.49(c).

²⁷ 47 C.F.R. § 1.115(a).

application for review in whole or in part, or it may deny the application with or without specifying reasons therefor.²⁸ No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.²⁹

8. Havens maintains that the segment of the Arkansas River known as the Arkansas Headwaters should be treated as a distinct navigable inland waterway for purposes of the AMTS service coverage requirement.³⁰ He argues that the Bureau's contrary conclusion violates the clear language of the AMTS service coverage requirement, case and statutory law that define navigable waterways, federal and state authorities that define and regulate the Arkansas Headwaters segment of the Arkansas River, and commonly available descriptions of the Arkansas River.³¹ Furthermore, Havens avers that "such authorities are the *only* authorities on determinations of 'navigable waters' accepted under Part 80 rules—the FCC by rule defers to them"³²

9. We agree with the Bureau that under Part 80 of the Commission's Rules, the Arkansas Headwaters is part of the Arkansas River and not a distinct inland waterway.³³ The Commission's Part 80 rules are devoid of any provision allowing applicants to "subdivide" a waterway, including those waterways that may have breaks in navigability, when that waterway is commonly mapped as a single geographic unit.³⁴ As the Bureau correctly noted, other than a few specific exceptions,³⁵ the Commission has consistently treated inland bodies of water that are commonly referred to as one river as single waterways, even if they are not continuously navigable.³⁶ In this connection, we note that Part 80 defines the term "navigable waters" to include "internal waters as contained in 33 C.F.R. § 2.05-25."³⁷ The referenced rule, promulgated by the U.S. Coast Guard, defines navigable waters to include "internal waters of the United States . . . that are or have been used, or are or have been susceptible for use, by

²⁸ 47 C.F.R. § 1.115(g).

²⁹ 47 C.F.R. § 1.115(c). Havens states that information included in two exhibits to the Application for Review support contentions made in the Application for Review. Assuming *arguendo* that this is so, much of the material presented in these exhibits is barred at this juncture because it was not presented below. *Id.* See also Opposition at 2 quoting Application for Review at 2 (this Application "provides certain clarifications to and further details of the facts and arguments in [Havens's] Petition for Reconsideration and Petition for Review . . . regarding the above-captioned [a]pplications.").

³⁰ Application for Review at 8-10.

³¹ *Id.* at 3-4.

³² *Id.* (note omitted) citing 47 C.F.R. § 80.25 [sic]. See also *id.* at 9-10 (arguing that Part 80 rule definitions refer to non-FCC governmental authority and, specifically, the United States Coast Guard).

³³ *Order on Further Reconsideration*, 16 FCC Rcd at 19244 ¶ 10.

³⁴ Under Part 80, the term "inland waters" as used in reference to waters of the United States, its territories and possessions, means waters that lie landward of the boundary lines of inland waters as contained in 33 C.F.R. Part 82, as well as waters within its land territory, such as rivers and lakes, over which the United States exercises sovereignty. The term "navigable waters" as used in reference to waters of the United States, its territories and possessions, means the waters shoreward of the baseline of its territorial sea and internal waters as contained in 33 C.F.R. § 2.05-25.

³⁵ See 47 C.F.R. § 81.913(a) (1982) (dividing Mississippi River into upper and lower sections); 47 C.F.R. § 81.913(a) (1985) (dividing Gulf of Mexico into eastern and western sections).

³⁶ *Order on Further Reconsideration*, 16 FCC Rcd at 19242 ¶ 6.

³⁷ See 47 C.F.R. § 80.5 (Definitions). The referenced rule, 33 C.F.R. § 2.05-25 (Navigable waters of the United States; Navigable Waters; Territorial Waters) is within Part 2 (Jurisdiction) of Chapter I (Coast Guard, Department of Transportation) of Title 33 (Navigation and Navigable Waters) of the Code of Federal Regulations.

themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, *notwithstanding natural or man-made obstructions that require portage.*”³⁸

10. Havens argues that the AMTS coverage requirement has been unreasonably applied in this proceeding.³⁹ In support of this argument, Havens refers to two Part 90 services (800 MHz Specialized Mobile Radio⁴⁰ and certain 220-222 MHz band channels used for Private Land Mobile Radio⁴¹) where the Commission adopted “substantial service” as an alternative for geographic area licensees who could not satisfy the applicable population service coverage requirement because of incumbent operations. Havens argues that his situation is similar to those Part 90 geographic licensees who were unable to satisfy their service coverage requirements because of incumbent operations and thus, required a reasonable alternative such as “substantial service.”⁴² He argues that satisfying the AMTS service coverage requirement in this case is not possible because the Arkansas River is not fully navigable and thus, the Commission should apply the coverage requirement in a reasonable manner that would allow the captioned applications to be granted.⁴³ We note that the subject application for review represents the first time that Havens raised this particular argument. Because Havens did not raise this argument earlier when the matter was being considered under delegated authority, its consideration at this juncture is barred.⁴⁴

11. In support of his claim that Regionet has received favorable licensing treatment, Havens refers to certain Regionet applications which he contends did not comply with the service coverage requirements but were nonetheless granted.⁴⁵ Havens further contends that these applications were improperly granted pursuant to Section 80.477(c).⁴⁶ We note that Havens has offered no evidence that would cause us to differ with the Bureau’s judgment that it was reasonable for the staff to conclude that the applications were properly granted as extensions of Regionet’s existing West Coast system.⁴⁷ Contrary to what Havens contends,⁴⁸ the Bureau did not suggest in the *Order on Further Reconsideration*

³⁸ 33 C.F.R. § 2.05-25(a)(3)(i) (emphasis added).

³⁹ Application for Review at 12.

⁴⁰ Application for Review at 11 n.15 *citing* Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order on Reconsideration*, PR Docket No. 93-144, 14 FCC Rcd 17556, 17568 ¶ 18 (1999).

⁴¹ Application for Review at 12 n.16 *citing* Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order; Fifth Notice of Proposed Rule Making*, PR Docket No. 89-552, 12 FCC Rcd 10943, 11020 ¶ 163 (1997).

⁴² Application for Review at 10-12.

⁴³ *Id.*

⁴⁴ See 47 C.F.R. § 1.115(c). In any event, we believe that Havens’s reliance on the “substantial service” provisions under Part 90 is misplaced because these Part 90 provisions apply to licensees granted authority for a given geographic area, whereas Havens’s captioned applications are for site-based authority. Moreover, the Commission recently concluded that AMTS licensing differs from the 800/900 MHz Specialized Mobile Radio service. See Amendment of the Commission’s Rules Concerning Maritime Communications, *Second Memorandum Opinion and Order and Fifth Report and Order*, PR Docket No. 92-257, 17 FCC Rcd 6685, 6707 ¶ 49 n.211 (2002) (AMTS incumbent licensees are not entitled to the geographic area licensee requirement of substantial service at the end of license term).

⁴⁵ Application for Review at 13-14.

⁴⁶ *Id.*

⁴⁷ *Order on Further Reconsideration*, 16 FCC Rcd at 19243 ¶ 8.

⁴⁸ “Section 80.477(c) does not even remotely suggest that additional stations can be added for the sole purpose of expanding coverage into inland waterways. That is purely a staff interpretation that cannot stand muster.” Application for Review at 14.

that the subject Regionet extensions were granted under Section 80.477(c). Rather, the Bureau suggested that if the extensions, once granted, had a secondary effect of providing coverage to these inland waterways, such coverage was permitted under Section 80.477(c).⁴⁹ Finally, we agree with the Bureau that to the extent that granting any of these Regionet applications could have been erroneous, as Havens alleges, such error would provide no basis for granting Havens's captioned applications.⁵⁰

IV. CONCLUSION

12. After reviewing the instant application for review, we believe that Havens has failed to demonstrate that the *Order on Further Reconsideration* contains a material error or did not fully and fairly consider the arguments raised therein. We therefore deny Havens's application for review.⁵¹ In view of the foregoing, we affirm the Division's conclusion that as the term "navigable inland waterway" is used in the Commission's Part 80 rules, the Arkansas Headwaters is part of the 1,450-mile Arkansas River and is not a distinct waterway.⁵² Because the Arkansas River is greater than 150 miles in length, an AMTS application that proposes to serve it can be granted only if the proposed system will provide continuity of service to at least 60 percent of the river.⁵³ In this case, Havens proposed to serve only 146 miles, or approximately 10 percent, of the Arkansas River. Therefore, we conclude that Havens's applications were properly dismissed as defective.

⁴⁹ *Order on Further Reconsideration*, 16 FCC Rcd at 19243 ¶ 8.

⁵⁰ *Id.*; see also Applications of Fred Daniel d/b/a Orion Telecom, *Order on Reconsideration*, 14 FCC Rcd 1050, 1055 n.43 (WTB PSPWD 1999) (citing Quinnipiac College, *Memorandum Opinion and Order*, 8 FCC Rcd 6285, 6286 ¶ 12 (1993)).

⁵¹ On January 4, 2002, Havens filed a petition for a declaratory ruling on whether the Division complied with Section 309 of the Communications Act of 1934, as amended, when it dismissed the captioned applications as opposed to designating them for hearing. Petition for Declaratory Ruling Concerning Requirements of Section 309 of the Communications Act of 1934, as Amended, as Applied to AMTS Application Denials (dated Jan. 4, 2002). In addition to the captioned applications, the petition also cited Havens's dismissed applications to serve various waterways in Texas. See Applications of Warren C. Havens, *Order on Reconsideration*, 16 FCC Rcd 18046 (WTB PSPWD 2001); Applications of Warren C. Havens, *Order*, 16 FCC Rcd 2539 (WTB PSPWD 2001). This petition was not captioned under the instant proceeding and did not include a certificate of service on Regionet. On April 17, 2002, the Division concluded that this petition for declaratory ruling appeared to be a prohibited *ex parte* presentation that should be made part of the record of this restricted proceeding and served it on Regionet. See Letter from Ramona E. Melson, Deputy Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau to John Reardon, Esquire, Mobex Communications, Inc. (dated Apr. 17, 2002). The Division served the petition for declaratory ruling on Regionet in accordance with 47 C.F.R. § 1.1212. On September 18, 2002, in the proceeding that involves the applications to serve the Texas waterways, the petition was dismissed. See Applications of Warren C. Havens, *Memorandum Opinion and Order*, FCC 02-256 (rel. Sep. 18, 2002).

⁵² 47 C.F.R. § 80.475(a).

⁵³ *Id.*

V. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the application for review filed by Warren C. Havens on November 30, 2001, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary